

On May 14, 2009, the Court received from petitioner a letter in which petitioner stated that on May 10, 2009 he had submitted a request to prison officials for the requisite IFP

1 documents; petitioner asked the Court to “hold the deadline a few days.” When petitioner  
2 still had not filed a completed IFP application by June 9, 2009, the Court dismissed the action  
3 without prejudice.

4 Subsequently, on June 22, 2009, petitioner filed a completed IFP application with the  
5 requisite documents. Additionally, on June 25, 2009, petitioner filed a letter in which he  
6 objects to the dismissal of the instant action; petitioner asserts the delay in petitioner’s filing  
7 his completed IFP application was the result of inaction on the part of prison officials and not  
8 petitioner. Good cause appearing, the Court will grant petitioner’s motion to vacate the order  
9 of dismissal and will direct the Clerk to reopen the instant action. Further, in view of  
10 petitioner’s lack of funds, petitioner’s application to proceed IFP will be granted.

### 11 BACKGROUND

12 In 1998, in the Superior Court of Humboldt County, petitioner was found guilty of  
13 attempted murder, assault with a deadly weapon, and various enhancements. He was  
14 sentenced to a term of thirty years to life in state prison. The California Court of Appeal  
15 affirmed the conviction. Petitioner did not at that time seek further state court review. In  
16 January 2006, petitioner discovered that his trial attorney had never advised him that the  
17 District Attorney, in April 1997, had conveyed an offer to petitioner’s attorney that would  
18 have allowed petitioner to plead guilty to assault with a deadly weapon in exchange for a  
19 determinate sentence of twenty-one years. Petitioner returned to state court to seek habeas  
20 corpus relief on grounds of ineffective assistance of counsel. On December 19, 2007, the  
21 California Supreme Court denied petitioner’s state habeas corpus petition.

### 22 DISCUSSION

#### 23 A. Standard of Review

24 This Court may entertain a petition for a writ of habeas corpus “in behalf of a person  
25 in custody pursuant to the judgment of a State court only on the ground that he is in custody  
26 in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a);  
27 Rose v. Hodges, 423 U.S. 19, 21 (1975). A district court shall “award the writ or issue an  
28 order directing the respondent to show cause why the writ should not be granted, unless it

appears from the application that the applicant or person detained is not entitled thereto.” 28 U.S.C. § 2243. Summary dismissal is appropriate only where the allegations in the petition are vague or conclusory, palpably incredible, or patently frivolous or false. See Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990) (quoting Blackledge v. Allison, 431 U.S. 63, 75-76 (1977)).

B. Petitioner’s Claim

Petitioner claims the failure of his attorney to advise him of the District Attorney’s plea offer constituted ineffective assistance of counsel, in that petitioner would have accepted such plea had he been so advised. Liberally construed, petitioner’s claim is cognizable. See Jones v. Wood, 114 F.3d 1002, 1012 (9th Cir. 1997) (holding trial counsel’s failure to inform defendant of prosecution’s offer of plea bargain before rejecting it on defendant’s behalf may rise to level of ineffective assistance of counsel).

The petition cannot go forward, however, because a proper respondent has not been named. The proper respondent in a habeas action is “the state officer having custody of the applicant,” if the applicant is in custody. See Rule 2, Rules Governing Habeas Corpus Cases Under Section 2254. “The proper person to be served in the usual case is either the warden of the institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal institutions.” Id. Advisory Committee Notes. Failure to name a petitioner’s custodian as a respondent deprives the federal court of personal jurisdiction. See Stanley v. California Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994). In the instant petition, petitioner identifies two respondents: the State of California and the Humboldt County Superior Court, none of which is a proper respondent. Accordingly, before the Court can issue an order to show cause directing the respondent to answer the petition, petitioner must file an amendment to the petition to substitute, as the respondent, the warden of the prison where he is currently incarcerated.

### CONCLUSION

For the reasons stated above, the Court orders as follows:

1. The Court’s prior order of dismissal is hereby VACATED. The Clerk is hereby

1 directed to REOPEN the instant action.

2 2. Petitioner's application to proceed in forma pauperis is hereby GRANTED.

3 3. Petitioner must file an amendment to the petition to name the proper respondent.

4 The amendment must include the caption and civil case number used in this order (No. C 09-  
5 1847 MMC (PR)), and must be titled "Amendment to Petition to Name Proper Respondent."

6 Petitioner must file the amendment to the petition within **thirty (30)** days of the date this  
7 order is filed. Failure to timely file the amendment will result in the dismissal of this action  
8 for lack of jurisdiction.

9 IT IS SO ORDERED.

10 DATED: July 10, 2009

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12 MAXINE M. CHESNEY  
13 United States District Judge  
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